Supreme Court, U.S.
FILED
AUG - 4 2000
OFFICE OF THE CLERK

(1)

No. 00 204

In The
Supreme Court of the United States

MICHELLE WEST,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

*S. ALLEN EARLY, III
LAW OFFICES OF S. ALLEN EARLY
163 Madison Avenue
Suite 229
Detroit, MI 48226

(313) 962-2320

Attorney for Petitioner
**Counsel of Record*

August, 2000

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

65pp

QUESTION PRESENTED

I.

Was there a jurisdictional defect in the indictment which barred the prosecution of Petitioner's criminal case, thus requiring that her conviction be set aside and the case remanded for a new trial?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are: (1) United States who was the Plaintiff in the district court criminal action, Respondent in the section 2255 proceedings, and Appellee in the Court of Appeals, and (2) Michelle West who was the Defendant in the district court criminal action, Petitioner in the section 2255 proceedings, and Appellant in the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF APPENDIX CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS AND COURT RULES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	15

TABLE OF APPENDIX CONTENTS

6TH CIRCUIT FILINGS **PAGE**

Order Denying Petition for
Reconsideration
5/9/00 ..... A1 - A2

Order Denying Application for
Certificate of Appealability
11/22/99 ..... B1 - B1

EASTERN DISTRICT OF MICHIGAN FILINGS

Order Denying Petitioner's
Application for Certificate
of Appealability
1/22/99 ..... C1- C3

Order Accepting Report and
Recommendation of Magistrate
Judge Denying Petitioner's Section
2255 Motion
12/11/98 ..... D1-D2

PAGE

Magistrate Judge's Report and
Recommendation on Section 2255
Motion
10/27/98. . . . . E1-E21

TABLE OF AUTHORITIES

Page

Cases

Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1973) 13

Campbell v. Louisiana, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.3d 551 (1998) 9

Ex Parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) 8

Johnson v. Morgan, 962 F.2d 1185 (6th Cir. 1992) 13

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938) 12

Kelly v. United States, 29 F.3d 1107 (7th Cir. 1994) 12

Midland Asphalt Corp., v. United States, 489 U.S. 794, 114 S.Ct. 1996, 128 L.Ed.2d 849 (1989) 13

Page

Plessy v. Ferguson, 163 U.S. 557, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) 14

Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) 9, 10

Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) 9

Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) 12

United States v. Broce, 488 U.S. 563, 101 S.Ct. 757, 102 L.Ed.2d 927 (1989) 13

United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) 9

United States v. Flowers, 85 F.3d 629, 1996 WL 262484 (6th Cir. 1996), *petition for cert. filed* July 6, 2000, No. 00-49 12

United States v. Greene, 971 F.Supp. 1117 (E.D. Mich. 1997) 4, 6

United States v. Macklin, 523 F.2d 193 (2d Cir. 1975) 11

Page

United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998) 6, 8, 12

United States v. Robinson, et al., 96 F.3d 1449 (table), 1996 WL 506498 (6th Cir. 1996) 4

United States v. Spinner, 180 F.3d 514 (3d Cir. 1999) 12

Statutes

18 U.S.C. § 924(c) 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1861 5

28 U.S.C. § 1862 5

28 U.S.C. § 1863(a) 5

28 U.S.C. § 2101(c) 2

28 U.S.C. § 2255 ..... *passim*

Court Rules

Fed.R.Crim.P. 12(b) 3, 11

Supreme Court Rule 13.3 2

Page

Constitutions

U.S. Const., Art. I, § 9, cl. 2 12

NO.

In The
Supreme Court of the United States
October Term 2000

MICHELLE WEST,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Michelle West respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding denying Petitioner's Application for a Certificate of Appealability to review the denial of first motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255. Certiorari is requested so that this Court may afford relief to Petitioner, who was indicted three times by a grand jury convened in violation of Petitioner's Fifth Amendment rights of Due Process and Equal Protection, as well as prosecuted by a district court that was itself without subject matter jurisdiction in light of the defective grand jury

indictments.

OPINIONS BELOW

The Orders of the Untied States Court of Appeals for the Sixth Circuit (denying Petitioner's application for a Certificate of Appealability) are not published and are reprinted at A1 and B1. The Orders of the District Court (denying Petitioner's Application for a Certificate of Appealability and accepting report and recommendation of Magistrate Judge) are reprinted respectively at C1 and D1. The Magistrate Judge's report and recommendation on Petitioner's § 2255 Motion is reprinted at E1.

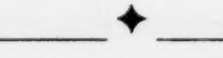
JURISDICTION

The Order of the Sixth Circuit denying Petitioner's Petition for Reconsideration was entered on May 9, 2000. Pursuant to 28 U.S.C. § 2101(c) and Rule 13.3, Supreme Court Rules, this Petition for Certiorari has been filed within 90 days of the date of the denial of the Petition for Reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

28 U.S.C. § 2255 provides, in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.



Fed.R.Crim.P. 12(b) states in pertinent part:

> **(b) Pretrial Motions**. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (2) Defenses and objections based on defects in the indictment or information (other than it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any

time during the pendency of the proceedings); or

. . . .

STATEMENT OF THE CASE

West was initially indicted on May 3, 1993 for her alleged involvement in a conspiracy to distribute cocaine, aiding and abetting drug related murder and false statements to a bank. On June 25, 1993, the government filed a second superseding indictment in which West was charged in a fourth count with money laundering. On November 5, 1993, Petitioner was charged in a third superceding indictment wherein the allegations of the money laundering count were amended. Petitioner was convicted by a jury on December 22, 1993.[1]

Prior to the indictments, the judges of the Eastern District of Michigan approved an illegal and unconstitutional Jury Selection Plan (hereafter "the Plan"), on February 3, 1992.[2] The purpose of the Plan was to select grand and petit juries at

---

[1] The circumstances of Petitioner's conviction were addressed during West's direct appeal to the United States Court of Appeals for the Sixth Circuit and are summarized in *United States v. Robinson, et al.*, 96 F.3d 1449 (table), 1996 WL 506498 (6th Cir. 1996) and in E1.

[2] In *United States v. Greene*, 971 F.Supp. 1117 (E.D. Mich. 1997), there is a lengthy discussion about the Plan and its implementation.

random from a fair cross-section of the community, and to assure that all citizens would have the opportunity to be considered for service on grand and petit juries. The Plan's purpose was to also implement section 1862 of the Jury Selection and Service Act ("JSSA"), 28 U.S.C. § 1861 *et seq.*[3]

Section VIII.B. of the Plan called for a "subtraction method" of balancing the jury wheel to ensure that different groups in the community were represented to a degree and level of their percentages in the general population. In order for the district court for the Eastern District of Michigan to achieve such a "balance" of the different community groups, Section VIII.B. permitted the chief judge of the Court to issue an order to the jury selection Clerk to strike certain names from the qualified jury wheel so that the potential jurors closely approximated the percentage of the population of each group in the area of each place of holding court.

On April 1, 1992, the Judicial Council of the United States Court of Appeals for the Sixth Circuit reviewed and approved the Plan in accordance with 28 U.S.C. § 1863(a). Thereafter, several administrative orders were issued by the district court to implement the Plan. These administrative orders resulted in the exclusion of non-African-Americans

---

[3] 28 U.S.C. § 1862 provides that no citizen shall be excluded from service as a grand or petit juror on the district courts of the United States on account of race, color, religion, sex, national origin or economic status.

from the jury wheel simply because of their racial make-up.[4] The net effect of these administrative orders was the engagement of purposeful *de jure* intentional discrimination by the district court for the Eastern District of Michigan during the period between February 3, 1992 (date when the Plan was first implemented) and February 23, 1998 (date when the Plan was found unconstitutional in *United States v. Ovalle,* 136 F.3d 1092 (6th Cir. 1998).[5]

After the *Ovalle* case was rendered, West filed her first § 2255 Motion in the district court seeking to set aside her conviction on the basis of *Ovalle* and other issues. The Magistrate Judge recommended to deny the § 2255 Motion on October 27, 1998. The district court accepted the Magistrate's report and recommendation on December 11, 1998, and denied Petitioner's Application for a Certificate of

---

[4] The rationale for the exclusion of whites and other non-African-Americans was to ensure that African-Americans were fairly represented in the qualified jury wheel.

[5] As Judge Rosen noted in *Greene, supra,* 971 F. Supp. at 1123, n. 6, the Plan was so invidious that until April, 1997, once a white person's name was removed, that person was never returned to the wheel. The Chief Judge for the Eastern District then issued Administrative Order No. 97-AO-019, implementing § VIII(B) of the Plan, and for the first time since first being implemented in 1992, ordered that "[t]he names of the 1462 jurors removed are to be retained for future use." *Id.*

Appealability on January 21, 1999. West appealed to the Sixth Circuit. On November 22, 1999, the Sixth Circuit denied Petitioner's Application for a certificate of appealability and on May 9, 2000, Petitioner's petition for reconsideration was denied.

The Magistrate Judge erroneously recommended denial of the § 2255 Motion notwithstanding that Petitioner was indicted by an illegally constituted grand jury and convicted by an illegally constituted petit jury. The Magistrate Judge reasoned that Petitioner had waived any claims with respect to the illegal Plan by failing to raise the issue prior to trial.[6] In her petition for reconsideration before the Sixth Circuit, Petitioner pointed out that there was a jurisdictional defect in her indictments because they were returned by a illegally constituted grand jury.[7]

Petitioner need not challenge the racial composition of the

---

[6] Petitioner's trial counsel did object to the Plan in general and to the under representation of blacks on the jury panel prior to selection of the petit jury from the jury panel brought to the courtroom, as alleged in her § 2255 Motion. However, the Magistrate Judge concluded that the objection was insufficient and tardy.

[7] The Magistrate Judge focused solely upon trial counsel's objection as a challenge to the jury composition, a challenge which can be waived. Although Petitioner contends that she did preserve a challenge to the jury composition, a jurisdictional defect cannot be waived.

grand juries that indicted her or the petit jury that convicted her. Petitioner is stating that the illegal system created by the judges of the Eastern District of Michigan in the selection of the grand juries prevented the assembly of a proper grand jury. In the absence of a proper grand jury to vote on the substance of the charges, Petitioner's indictments had a jurisdictional defect.

REASONS FOR GRANTING THE PETITION

Petitioner is seeking to set aside a conviction that was obtained in violation of Petitioner's Fifth and Sixth Amendment rights and which contained a jurisdictional defect. The starting point of analysis in this case is that the Plan that was created and adopted by the judges of the Eastern District and approved by the Sixth Circuit's Judicial Council was illegal and unconstitutional from its inception. *See Ovalle*. That type of illegal Plan and system for selection of potential grand and petit juries prohibited from the very beginning of the selection process the selection and empaneling of any valid grand or petit jurors. Indictments that were issued by grand juries convened under the illegal Plan were void *ab initio* and left the District Court without subject matter jurisdiction.

The Sixth Circuit's Order to the contrary is in direct conflict with this Court's decision in *Ex Parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). In *Ex Parte Bain,* this

Court made clear that an indictment is an **indispensable jurisdictional ingredient** of the court's power to try a defendant. The requirement of prosecution by indictment is included as a personal right in the Fifth Amendment to protect a presumably innocent defendant.[8] Absent a valid indictment, a district court simply lacks the power and authority to prosecute the accused.

An indictment protects the Sixth Amendment right that an accused "be informed of the nature and cause of the accusation." *See Russell v. United States,* 369 U.S. 749, 761, 82 S.Ct. 1038, 1045, 8 L.Ed.2d 240 (1962). When a legally constituted grand jury --the neutral buffer between the government and the accused-- is absent, the accused's Fifth and Sixth Amendment rights may easily be eviscerated. *Id.*

In *Campbell v. Louisiana,* 523 U.S. 392, 118 S.Ct. 1419, 1423, 140 L.Ed.3d 551 (1998), citing *Rose v. Mitchell,* 443 U.S. 545, 546, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), this Court stated that "[D]iscrimination on the basis of race in the

---

[8] The historical basis for this right arose during the seventeenth century when the English Crown Prosecutor had tremendous power in a criminal case while the accused had very few rights and protections. As a result, the Founding Fathers insisted that the grand jury be interposed between the government as accuser and the citizen as the accused to serve as a necessary shield for the citizen. *See United States v. Calandra*, 414 U.S. 338, 342-43, 94 S.Ct. 613, 617-18, 38 L.Ed.2d 561 (1974).

selection of members of a grand jury . . . strikes at the fundamental values of our judicial system" because the grand jury is a central component of the criminal justice process. The Fifth Amendment requires the Federal Government to use a grand jury to initiate a prosecution, and 22 States adopt a similar rule as a mattter of state law. *Id.* This Court further stated that the grand jury, like the petit jury, "acts as a vital check against the wrongful exercise of power by the State and its prosecutors." It controls not only the initial decision whether to indict, but also significant decisions such as how many counts to charge and whether to charge lesser or greater offenses, including the important decision whether to charge a capital crime. **"The integrity of these decisions depends on the integrity of the process used to select the grand jurors. If that process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions."** (Emphasis added). *See Rose, supra,* 443 U.S. 555-556 ("Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process").

It can hardly be disputed that in this case, the integrity of the judicial process is certainly in doubt when the very institution designed to protect Constitutional rights is in the business of violating them. Not only did the integrity of the judicial process suffer, but this type of selection system also created a jurisdictional defect in West's indictments since

they were not voted upon by legally constituted grand juries.

For example, in *United States v. Macklin,* 523 F.2d 193, 195 (2d Cir. 1975), the Court held that the **lack of a proper grand jury is not merely a defect in the institution of the prosecution, which must be raised only by motion before trial per Rule 12(b)(2). Instead, the Second Circuit held that this type of defect also left the court without jurisdiction.** The *Macklin* holding was premised on the theory that a properly constituted grand jury did not vote on the substance of the charges.[9]

In this case, there was never a properly constituted grand jury because of the unconstitutional Plan that was in effect. The absence of a legally constituted grand jury created a jurisdictional defect in West's indictments. The Sixth Circuit's Order is contrary to constitutional and case law because there is a jurisdictional defect. There is simply no distinction between the illegally constituted grand juries in *Macklin* and in this case. Both grand juries were improperly convened. In *Macklin*, the jurisdictional defect resulted from a grand jury whose term had expired. In this case, the jurisdictional defect resulted from the illegal system for the selection of grand and petit juries that was created by the

---

[9] In *Macklin,* the indictment was handed down after the life of the grand jury had expired and therefore, it was a nullity, despite the entry of a plea of guilty by defendant Macklin.

judges of the Eastern District of Michigan and sanctioned by the Sixth Circuit.[10]

A jurisdictional defect cannot be waived. In *United States v. Spinner,* 180 F.3d 514 (3d Cir. 1999) and *Kelly v. United States,* 29 F.3d 1107 (7th Cir. 1994), it was held that a jurisdictional defect is never waivable nor subject to a procedural default even if there is a guilty plea. Such a defect may be raised at any time. In fact, the original purpose of a writ of habeas corpus (such as in this case) was to allow relief where a defendant was convicted by a court that lacked jurisdiction in the first instance. *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938).

This Court has repeatedly held that a conviction may be

---

[10] Not only did the Sixth Circuit approve the illegal Plan, but when challenged, has refused to offer anyone any relief. Instead, the Court has simply used procedural roadblocks to deny criminal defendants the Due Process that is guaranteed in the Fifth Amendment. To date, only the defendants in *Ovalle, supra,* have been afforded relief. *See United States v. Flowers,* 85 F.3d 629, 1996 WL 262484 (6th Cir. 1996), *petition for cert. filed* July 6, 2000, No. 00-49. This Court should not permit this jurisdictional defect to go uncorrected solely on the basis of a procedural rule. Indeed, this Court has suggested that any narrowing of the opportunities to obtain collateral relief is itself an unconstitutional suspension of the writ of habeas corpus. U.S. Const., Art. I, § 9, cl. 2; *Sanders v. United States,* 373 U.S. 1, 11-12, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

collaterally attacked if the challenge is to the court's power to enter the conviction and impose the sentence. *See United States v. Broce,* 488 U.S. 563, 574-576, 101 S.Ct. 757, 102 L.Ed.2d 927 (1989); *Blackledge v. Perry,* 417 U.S. 21, 30-31, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1973) (holding that a collateral attack may be made if the challenge is to the very power of the State to bring the defendant into court to answer the charge brought against him).

The illegal Plan prohibited the assembly of a proper grand jury. The non-existence of a properly constituted grand jury resulted in a jurisdictional defect which deprived the district court of its power to act in this case. This defect was so fundamental since it constituted a structural defect (because it was court-created and approved by the Sixth Circuit's Judicial Council), that it caused the grand jury to no longer be a grand jury or the indictment to no longer be an indictment. *See Midland Asphalt Corp., v. United States,* 489 U.S. 794, 802, 114 S.Ct. 1996, 128 L.Ed.2d 849 (1989).[11]

---

[11] In *Johnson v. Morgan,* 962 F.2d 1185 (6th Cir. 1992), it was recognized that if the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, prejudice to a defendant is presumed. In this case, the entire system for prosecuting criminal defendants in the Eastern District of Michigan was so compromised since there was illegal discrimination by the very court that is supposed to be the enforcer and guardian of the Constitution.

The Eastern District of Michigan was engaged in purposeful racial discrimination. Potential grand and petit jurors were not permitted to come to the courthouse for service simply because of their race. The illegally constituted grand and petit juries which were selected under the illegal Plan indicted and convicted Petitioner. Petitioner, a first offender and mother of a minor child, was sentenced to two life terms plus 30 years. She deserved to have a valid indictment and a validly constituted petit jury. This Court is empowered to remedy this fundamental injustice. It is quite an anomaly for a federal court system to engage in purposeful discrimination and then to deprive criminal defendants of any relief. This type of illegal system smacks of the days of *Plessy v. Ferguson,* 163 U.S. 557, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).[12]

---

[12] Petitioner is only seeking a fair and constitutional process during her criminal proceedings. A reversal in this case would not necessarily release Petitioner from having to face charges. It would only ensure that West will be indicted by a constitutionally firm grand jury. This Court should not be concerned with a "floodgates" argument. A floodgates argument can be made in every case before this Court. If that was the litmus test, this Court would be hesitant in all cases where many defendants can benefit from its decisions, and deny relief on that basis.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition and issue a writ of certiorari remanding to the District Court for an Order dismissing the Petitioner's third superseding indictment and vacating her conviction.

S. ALLEN EARLY
(Counsel of Record)
Attorney for Petitioner

Suite 229
163 Madison
Detroit, MI 48226
(313) 962-2320

Dated: July 31, 2000

TABLE OF APPENDIX CONTENTS

6TH CIRCUIT FILINGS: **PAGE**

Order Denying Petition for Reconsideration filed 5/9/00 ..... A1-A2

Order Denying Application for Certificate of Appealability filed 11/22/99 ..... B1-B1

EASTERN DISTRICT OF MICHIGAN FILINGS:

Order Denying Petitioner's Application for Certificate of Appealability, filed 1/22/99 ..... C1-C3

Order Accepting Report and Recommendation of Magistrate Judge Denying Petitioner's Section 2255 Motion filed 12/11/98 ..... D1-D2

Magistrate Judge's Report and Recommendation on Section 2255 Motion filed 10/27/98 ..... E1-E21

UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

MICHELLE WEST, *Petitioner-Appellant,*	)	**ORDER**
vs.	)	**No. 99-1172**
UNITED STATES OF AMERICA, *Respondent-Appellee.*	)	

6th Circuit
Court of Appeals
Filed 5/9/00
Leonard Green,
Clerk

Before: **MOORE** and **GILMAN, Circuit Judges; MCKEAGUE, District Judge.**[1]

Michelle West moves for reconsideration of this court's prior order which denied her application for a certificate of appealability. *See* Fed. R. App. P.22(b). The certificate would have authorized an appeal from a district court judgment that denied a motion to vacate West's sentence under 28 U.S.C. § 2255.

---

[1]The Honorable David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

Upon review, we conclude that West has not cited any misapprehension of law or fact that would alter our court's decision. *See* Fed. R. App. P.40(a).

Accordingly, the motion for reconsideration is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

MICHELLE WEST,	)	
Petitioner-Appellant,	)	**ORDER**
	)	
vs.	)	**No. 99-1172**
	)	
UNITED STATES	)	
OF AMERICA,	)	
Respondent-Appellee.	)	

6th Circuit
Court of Appeals
Filed 11/22/99
Leonard Green,
Clerk

Before: **MARTIN, Chief Judge**

Michelle West appeals pro se from a district court judgment that denied a motion to vacate her sentence under 28 U.S.C. § 2255. The receipt of the notice of appeal has been construed as an application for a certificate of appealability. See Fed. R. App. P. 22(b).

Upon review, West's application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Western Dist. of Tennessee Filed 1/22/99

MICHELLE WEST,	)	
Petitioner,	)	**CIVIL ACTION NO.**
	)	**98-40130**
vs.	)	
	)	**HONORABLE**
UNITED STATES	)	**PAUL V. GADOLA**
OF AMERICA	)	**U.S. DISTRICT JUDGE**
Respondent.	)	

ORDER DENYING PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

Before the court is a request by petitioner, Michelle West, for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) (1) (B) (as amended April 24, 1996). Petitioner requests such a certificate in order to seek appellate review of this court's order dated December 18, 1998, denying her motion to vacate sentence pursuant to 28 U.S.C. § 2255. This court has reviewed the complete record and all the relevant authorities. Being fully advised in the premises, this court concludes that no certificate of appealability is warranted.

Section 2253 of Title 28 of the United States Code, as amended in 1996, reads in relevant part:

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> > (B) the final order in a proceeding under section 2255.

Federal Rule of Appellate Procedure 22(b), as amended, similarly provides that:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a certificate of appealability pursuant to section 2253 (c) of Title 28, United States Code.

The standard for the issuance of a certificate of appealability is set out at 28 U.S.C. § 2253 (c) (2) and provides that the certificate may be issued only upon a "substantial showing of the denial of a constitutional right." This recently enacted standard codifies the standard

promulgated in *Barefoot v. Estelle,* 463 U.S. 880, 892-93 (1983), for the issuance of a certificate of probable cause. *Lyons v. Ohio Adult Parole Authority,* 105 F.3d 1063, 1073 (6th Cir. 1997). The petitioner is not required to show that he will prevail on the merits, but rather that the issues are debatable among jurists of reason, that a court could resolve the issues differently, or that the questions are "adequate to deserve encouragement to proceed further." *Barefoot,* 463 U.S. at 893 n.4.

This court finds that petitioner has failed to make a substantial showing that any of the issues she identified amounts to a denial of her constitutional rights. Accordingly, a certificate of appealability will not issue from this court.

Therefore, it is hereby **ORDERED** that petitioner's application for certificate of appealability is **DENIED.**

SO ORDERED.

Dated: 1/21/99

/s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Western Dist. of Tennessee Filed 12/11/98

MICHELLE WEST,	)	**CIV. ACTION NO.**
Petitioner,	)	**98-40130**
	)	**CRIM. ACTION NO.**
vs.	)	**93-50028**
	)	
UNITED STATES	)	**HONORABLE**
OF AMERICA	)	**PAUL V. GADOLA**
Respondent.	)	**U.S. DISTRICT JUDGE**

ORDER ACCEPTING THE OCTOBER 27, 1998 REPORT AND RECOMMENDATION OF MAGISTRATE CARLSON AND DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

This court, pursuant to 28 U.S.C. § 636 (b) (1) (B), Fed. R. Civ. P. 72(b), and LR 72.1 (d) (2) (E.D. Mich. Jan. 1, 1992), has reviewed the October 27, 1998 report and recommendation of Magistrate Judge Thomas A. Carlson advising this court to deny petitioner's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. This court also reviewed plaintiff's objections to that report, filed on November 6, 1998, the government's November 31, 1998 supplement to its brief, and petitioner's December 7, 1998 response to that supplement.

After conducting a *de nova* review, the court accepts the mag-istrate judge's report and recommendation as the court's findings and conclusions.

Accordingly, it is hereby **ORDERED** that the mag-istrate judge's October 27, 1998 report and recommendation is **ADOPTED.**

IT IS FURTHER ORDERED that petitoner's motion to vacate, set aside or correct sentence pursuant to § 2255 is **DISMISSED** with prejudice.

SO ORDERED.

Dated: 12/11/98

/s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Western Dist. of Tennessee Filed 10/27/98

MICHELLE WEST, *Petitioner,*	)	**CRIMINAL NO. 93-CR-50028-02**
vs.	)	**CIVIL ACTION NO. 98-CV-40130-FL**
UNITED STATES OF AMERICA, *Respondent.*	)	**HONORABLE PAUL V. GADOLA U.S. DISTRICT JUDGE**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION: The instant Motion to Vacate, Set Aside, or Correct Sentence should be denied as Petitioner has shown no violations of her federal constitutional rights from alleged ineffectiveness of trial counsel.

Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence, by and through retained counsel, under 28 U.S.C. § 2255, on April 13, 1998, challenging the validity of her underlying federal convictions. Petitioner was convicted following a jury trial in December 1993 in the United States District Court for the Eastern District of Michigan of conspiracy to distribute controlled substances

(21 U.S.C. §§ 846, 841 (a) (1), & 841 (b) (1) (A)), drug-related homicide and aiding and abetting in drug-related homicide (21 U.S.C. § 848 (e) (1) (A) & 18 U. S.C. § 2), making false statements to a federally insured institution (18 U.S.C. § 1014), and laundering of monetary instruments (18 U.S.C. § 1956). Petitioner was sentenced to life imprisonment on the drug-related homicide, thirty years on making a false statement to a financial institution and twenty years for money laundering. After sentencing, the Sixth Circuit Court of Appeals affirmed her convictions and sentence in an unpublished opinion dated September 5, 1996. *United States v. Robinson, et al.,* 96 P.3d 1449 (table), 1996 WL 506498.

In her Motion to Vacate, Petitioner raises the following four issues:

1. Her trial jury was selected in violation of *United States v. Ovalle,* 136 F.3d 1092 (6th Cir. 1998).

2. She was denied the effective assistance of counsel when her attorney:

a) failed to object to evidence seized during an allegedly illegal search of her prison cell, and did not effectively

illegal search of her prison cell, and did not effectively defend her against Count six of the indictment (money laundering) by getting the court to grant a severance of this charge.

b) failed to object to the district court's response to a jury question about the meaning of "drug-related murder", along with the original charge on the offense.

c) failed to object to the drug quantity for which she was held accountable at sentencing, and for not pointing out to the court that her base level should be changed from 40 to 38 due to a retroactive change in the guidelines.

3. The government violated the Jencks Act by not ordering and providing plea transcripts of prosecution witnesses Edward Osborne and Anthony Bowling.

4. The prosecutor admitted after trial that Petitioner should not have been convicted of making a false statement, but nevertheless failed to prevent her from being given a 30 year sentence for that conviction.

The Respondent filed an answer to the Motion to Vacate on May 28, 1998, contending that Petitioner had waived her *Ovalle* challenge, that the overall performance of her counsel was within the range of that demanded of lawyers practicing criminal law, and that the allegations of a Jencks Act violation and prosecution misconduct were not legally or factually justified. The parties have also filed several replies to each other's answers (habeas docket #392, 399, 401-402, 404 and 410-411, 415) essentially repeating many of the allegations found in their original pleadings. The case was referred to the undersigned on June 3, 1998.

THE FACTS

The facts upon which the challenged convictions are based can be excerpted from the unpublished opinion of the Sixth Circuit Court of Appeals on September 5, 1996:

> Defendants Olee Wonzo Robinson and Michelle West were the central figures in a sizable drug and money-laundering conspiracy in Southfield, Michigan. For a

number of years, Robinson operated a car-leasing business in which West was an employee. As part of this "business," Robinson used false information to set up paper companies through which luxury cars, apartments, and even a Cessna airplane were obtained for his drug-dealing clientele and himself. Apparently, by channeling drug proceeds into financing arrangements for Range Rovers, Porsches, and similar cars, Robinson's operation managed to launder millions of dollars of drug money. Defendants also dealt cocaine directly in enormous quantities. According to government witness Anthony Bowling, West once showed him between 100 and 150 kilograms of cocaine in the trunk of her car. J.A. at 477. According to Edward Osborne, another witness, Robinson had him make frequent interstate trips to deliver and receive drugs. From California alone, Osborne estimated that a total of 200 to 250 kilograms of cocaine had been obtained in Robinson's behalf.

In April 1989, Robinson and West were leaving their office when they were robbed at gunpoint of over $24,000. It turns out

that the robber was someone they knew: Sherman Christian, another drug dealer and occasional boyfriend of West's friend, Cynthia Horry. Robinson soon responded by hiring Osborne (his trusted drug courier) and at least two others to find Christian and kill him, and Robinson paid the expenses and supplied the weapons needed to carry out the ultimate deed. After considerable searching, Osborne and his associates finally located Christian in June 1989. They followed his van on the highway, drew alongside it, and fired their guns into his side. Not only were they successful, their brutal act made the evening news. While watching the news on TV at Bowling's home, Robinson remarked to Bowling, "I told you I was going to get that [expletive deleted], didn't I[?]"

Christian's death satisfied not only the defendants, retributive instincts, but also their pocketbooks. West had previously arranged for Cynthia Horry to have Christian's life insured with Sun Life of Canada. Although the original beneficiaries on this policy had been Horry and her daughter (who was also Christian's daughter), the beneficiaries were soon changed

under suspicious circumstances. The first attempt to make the change failed. On the second attempt, the policy was made payable to West as trustee for Christian's children (including Christian's son by his ex-wife, Deborah Christian). Deborah Christian promptly challenged the arrangement, once she learned about it, asserting that the letter from her lawyer which purportedly acceded to the arrangement was a fraud. This dispute was eventually settled, with Deborah Christian and West dividing the proceeds equally. Not coincidentally, the witness on the change-of-beneficiary form had been Robinson, and Sherman Christian's signature on the form was later identified at defendants' trial as a forgery. At trial, the government also presented evidence showing that West had funneled her share of the insurance proceeds back into her illegal operations with Robinson.

In May 1993, federal authorities searched the defendants' homes and business premises pursuant to a warrant. Hundreds of items were seized, and many of these items were eventually admitted at trial. Although Robinson moved to suppress the evidence,

arguing that the search warrant had not been supported by probable cause, the district court denied this motion.

While incarcerated and awaiting trial, West reportedly received threatening letters and phone calls from Robinson. Though West later denied being worried about the threats, the administrator of the jail testified that he had seen West in tears, expressing great concern over the safety of her daughter. Upon further investigation, the FBI obtained a search warrant and went through the papers in her cell, under protest by West. West claimed in a subsequent evidentiary hearing that the FBI had violated her Sixth Amendment right to counsel by viewing confidential, attorney-client communications. The government responded that the officials had studiously avoided all privileged documents--including all papers with her attorney's letterhead--and had looked only for evidence of Robinson's threats. In addition, West had not demonstrated any prejudice. The district court denied relief on this claim.

Four days before the commencement of trial, the government amended Count Six of the indictment, which had charged West with laundering drug proceeds through payments on a 1989 Honda Civic. The indictment had previously described her actions as consisting of a $1,600 down payment on the Civic. When investigators learned that the "down payment" was really only a rebate, the government changed the indictment to state that West had made installment payments totaling $2,514.40. West objected to this last-minute amendment, and the district court seemed inclined to agree that the timing was somewhat unfair. However, the district court postponed its ruling on West's motion to sever/dismiss until the following week, telling the government, "So I'll leave it up to you to convince me between now and next Monday that [s]he's not been prejudiced. I don't know how you're going to do it." It appears that the issue was not revisited the next week. Later in the trial, West's attorney reminded the court that it had not yet ruled on the motion. The court then summarily denied the motion.

The trial itself began on November 9, 1993 and lasted until December 22, 1993. On the final day, during jury deliberations, the foreperson sent a note to the court with a single question: "Could you please further clarify what constitutes 'drug-related' in Count 3[?]". After consulting with the parties, the court responded, "In answer to your question above, I refer you to subparagraph (C) on page 38 of the Instructions as well as subparagraphs (A) and (B) on the same page." Subparagraph (C) on page 38 set forth the third necessary element for finding defendants guilty under 21 U.S.C. § 848 (e) (1) (A): defendants

> (C) Third, that the defendant took these actions while engaging in or working in furtherance of either a continuing criminal enterprise or a conspiracy to distribute over 5 kilograms of cocaine.
>
> Working in furtherance of a continuing criminal enterprise or a conspiracy means to intentionally do any act or

> take any action to achieve the purposes of the continuing criminal enterprise [or the] conspiracy.

In other words, the court explained "drug related" to the jurors by specifically directing them to the language, "engaging in or working in furtherance of." The defendants did not object.

Robinson and West were ultimately convicted as charged. Co-defendant Cynthia Horry was also convicted on a few counts, although she was acquitted on the drug-related homicide charge. Horry's appeal was expedited, see *United States v. Horry,* 49 F.3d 1178, 1179 (6th Cir. 1995). Co-defendant Shawn Wimberly remains a fugitive. *United States v. Robinson,* 1996 WL 506498.

Standard of Review

A prisoner may seek relief from a conviction and/or sentence under 28 U.S.C. § 2255 if the prisoner can demonstrate that there are flaws in the conviction or sentence which are jurisdictional in nature, constitutional in

magnitude, or result in a complete miscarriage of justice. *Boyer v. United States,* 55 F.3d 296, 298 (7th Cir.), *cert. denied,* 516 U.S. 904 (1995); *United States v. Todaro,* 982 F.2d 1025, 1028 (6th Cir.), *cert. denied,* 508 U.S. 943 (1993). Such relief, however, is not available if the prisoner failed to raise the claim on direct appeal or in a prior collateral proceeding (if any), unless he or she establishes sufficient cause for, and prejudice resulting from, the failure to raise the claim earlier. Rule 9 (b), Rules Governing 28 U.S.C. § 2255 Proceedings; *McCleskey v. Zant,* 499 U.S. 467, 489-96 (1991); *United States v. Frady,* 456 U.S. 152 (1982); *Boyer,* 55 F.3d at 298.

1. **JURY SELECTION METHOD**

Federal Rule of Criminal Procedure 12 (b) (2) provides that "[d]efenses and objections based on defects in the indictment or information" must be raised prior to trial. The Sixth Circuit in *United States v. Ovalle,* 136 F.3d 1092 (6th Cir. 1998), indicated that this rule "governs an untimely claim of discrimination in the selection of the grand jury 'even when such challenges are on constitutional grounds.'"[1] *Id.* at 1107 (quoting *Davis vs. United States,*

---

[1]The Sixth Circuit appears to create a standard inconsistent with the District Court's position in *United States v. Greene,* 971 F. Supp. 1117 (E.D. Mich. 1997). In *Greene,* the District Court found that the petitioner's

411 U.S. 233, 238 (1973)). "'Challenges of the petit jury are treated the same as challenges of the grand jury.'" *Id.* (quoting *United States v. Hearst,* 638 F.2d 1190, 1196 (9th Cir. 1980)).

Unlike the defendants in *Ovalle,* the present Petitioner failed to take advantage of the opportunity to file a motion to dismiss or for stay of the trial proceedings before voir dire of the jury began. Counsel for Petitioner's co-defendant even admitted that he had the opportunity to inspect the jury pool list and file any motions he felt necessary, yet failed to do so. Trial Voir Dire Transcript at 125-26. After the potential jurors were sworn by the trial judge, a generalized objection was made by defense counsel

---

constitutional claim based on discrimination need not be raised prior to trial per Fed. R. Crim. Pro. 12(b). The District Court stated that *Shotwell Mfg. Co. vs. United States,* 371 U.S. 341 (1963), did not "stand for the proposition that Rule 12(b) requires constitutional challenges to be made prior to trial. Rather, in *Shotwell,* the trial court had denied a new trial motion challenging the jury selection process as untimely, and the Supreme Court simply found no abuse of discretion on the part of the trial judge in denying that motion." *Greene,* 971 F. Supp. at 1138. Yet, the Sixth Circuit, relying on both *Davis* and *Shotwell,* insists in the *Ovalle* opinion that constitutional claims of discrimination in the selection of a jury do indeed need to be raised in a timely fashion. *Ovalle,* 136 F.3d at 1107.

to the fact that not enough African-Americans were present, and cited to the Jury Selection and Services Act, 28 U.S.C. § 1861 ("J.S.S.A."), and several Sixth Amendment Supreme Court cases. See *Holland v. Illinois,* 493 U.S.474, reh'g denied, 494 U.S. 1050 (1990); *Duran v. Missouri,* 439 U.S. 357 (1979); *Taylor v. Louisiana,* 419 U.S. 522 (1975). Yet, defense counsel did not assert that the jury pool itself was in violation of his client's statutory and constitutional right to a fair trial, but instead that the jurors that appeared for voir dire did not include enough African-Americans. Trial Voir Dire Transcript at 7-9, 122-26. The trial court pointed out that the applicable standard was not whether this particular subset of potential jurors violated the Petitioner's right to a fair trial, but rather whether the system for selecting the entire jury pool resulted in the systematic discrimination of a portion of the population. *Id.* at 8, 123-25. Petitioner's defense counsel did not raise any cognizable objection to the jury pool selection process itself. Yet Petitioner now attempts to raise this very issue in this collateral proceeding. Because Petitioner failed to properly preserve the issue in her criminal trial below and has not offered any sufficient reason for failing to do so, her claim should he denied on this issue alone

2. **INEFFECTIVE ASSISTANCE OF COUNSEL**

Typically, ineffective assistance of counsel claims are *not* cognizable on direct appeal. *United States v.*

Gonzales, 929 F.2d 213, 215 (6th Cir. 1991); *United States v. Swidan,* 888 F.2d 1076, 1081 (6th Cir. 1989) ("This court will not review an ineffective assistance of counsel claim raised for the first time on appeal."). The customary procedure followed in this situation within the Sixth Circuit is to permit the defendant to raise his ineffectiveness of counsel claim in a proper post-conviction proceeding under 28 U.S.C. § 2255. *United States v. Castro,* 908 F.2d 85, 89 (6th Cir 1990) ("Furthermore, although it strongly appears that defendant Rocha was not denied effective assistance of counsel, this court declines to consider the claim of ineffective assistance of counsel for the first time on appeal. The defendant may properly raise this issue in a motion to the district court pursuant to 28 U.S.C. § 2255").

In order to establish an ineffective assistance of counsel claim, however, Petitioner has the burden of demonstrating that (1) his attorney made serious errors which undermined the proper functioning of the adversarial process, and that (2) but for those errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). A defendant asserting a claim of inadequate counsel must satisfy both elements of the test; the defendant must demonstrate constitutionally inadequate assistance of counsel and prejudice resulting therefrom. *Id.* at 697. Judicial scrutiny of counsel's performance must be highly deferential, *Id.* at 689, and because of the difficulties in assessing counsel's

performance, a reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (citing *Michel v. New York*, 350 U.S. 91, 101 (1955)).

The Petitioner has not met her burden here, and, upon review, the undersigned is persuaded that she has failed to show any serious errors in, or prejudice resulting from, her attorney's performance at trial or at sentencing. Contrary to Petitioner's assertion that she was denied the effective assistance of counsel when her lawyer failed to object to evidence seized by the FBI after a search of her prison cell,[2] the FBI official in charge of the cell search testified that no attorney-client materials had been touched during the probe. Furthermore, a hearing before the trial judge was held on the possible seizure of privileged material and decided against her. Consequently, Petitioner cannot relitigate the claim again.

---

[2]Specifically, Petitioner maintained that some of the records seen by the FBI agents during the search of her cell was privileged material sent to her by her attorney, and their viewing by the agents may have compromised her defense.

Contrary to Petitioner's contention that her attorney's failure to obtain a severance adversely affected her defense,[3] it is important to note that the trial court denied the severance motion only at the very end of a month and a half trial. Therefore, Petitioner effectively had more than just four days to prepare a "new" defense to the amended count; she had over six weeks, yet she was unable to refute the government's case. Moreover, the fact that the trial judge denied the motion at the end of the trial, after having observed the entire case, suggests that he did not believe a severance of the money laundering count would have benefitted Petitioner in any way. Accordingly, Petitioner's claim that she was denied the effective assistance of counsel by his failure to obtain a severance of the money laundering count should be rejected as she has shown no prejudice resulting from the alleged error.

Petitioner also complains that her attorney was ineffective for failing to object to a jury question during

---

[3]Petitioner claimed that her lawyer should have aggressively attempted to sever count six of the indictment that charged her with money laundering. As a result of her attorney's omission, she contends that she was denied an adequate opportunity to defend herself against the money laundering charge because the government amended the count only four days prior to trial.

deliberations to define "drug related murder".[4] (issue 2b). Essentially, Petitioner claims that no evidence was presented by the government that she engaged in drug distribution related to the murder, or that she engaged in a continuing criminal enterprise related to the murder. This issue was extensively discussed and rejected by the Sixth Circuit panel on direct review. The appeals court found that the evidence was sufficient to uphold Petitioner's conviction (as to drug-related homicide) as an aider and abettor to her co-defendant Robinson, and that the court's instruction on this charge did not affect the jury's verdict. As noted above, a § 2255 motion may not be used to relitigate an issue that was raised on appeal absent highly exceptional circumstances such as an intervening change in the law. *Du-Pont v. United States,* 76 F.3d 108, 110 (6th Cir. 1996).

There is also no merit to Petitioner's claim that counsel was deficient at sentencing for failing to adequately

---

[4]As explained by the Sixth Circuit of Appeals in rejecting this claim, the jury asked about a phrase--"drug-related murder"--that was not really a part of the statutory offense but merely shorthand for a more cumbersome description--i.e., killing while "engaging in or working in furtherance of a continuing criminal enterprise, or [while] engaging in an offense punishable under section 841 (b) (1) (A)." 21 U.S.C. § 848 (e) (1) (A). The court's answer properly directed the jury back to the part of the instruction dealing with this more cumbersome description.

challenge the amount of drug quantity attributable to her (claim 2c). Petitioner was held accountable for 500 or more kilograms of cocaine resulting in a base level of 40. Prior to calculating the guidelines, the government filed a supplemental brief documenting the quantity of narcotics for which she should have been held responsible (See attachment #10 of Respondent's Answer). Petitioner also received a four point enhancement in the sentencing guidelines for the leadership role she played in the drug distribution enterprise, and a two point enhancement for obstruction under U.S.S.G. § 3C1.1. As a result, Petitioner has a total offense level of 46, which resulted in a life sentence. While Petitioner correctly points out that the maximum drug base level in U.S.S.G. § 2D1.1 (c) has been retroactively reduced from 40 to 38 (requiring 150 kilograms or more of cocaine, not 500 or more), she still would have received a life term even if her total offense level was decreased from 46 to 44. Accordingly, Petitioner's claim that she was denied the effective assistance of counsel at sentencing should be rejected as she has shown no prejudice resulting from the alleged errors

3. **JENCKS ACT/MAKING A FALSE STATEMENT**

Finally, Petitioner alleges that the government violated the Jencks Act by not ordering and providing copies of the pleas of Edward Osborne and Anthony Bowling (claim 3). She also claims that the government's

lawyer agreed that she should not have been convicted of making a false statement to a federally insured institution (claim 4). Both of these claims can be quickly rejected as being without merit. Besides the fact that Petitioner could have ordered copies of Osborne and Bowling's guilty pleas, transcripts of government witnesses are not covered by the Jencks Act. *United States vs. Baker,* 358 F.2d 18, 19 (7th Cir. 1966); *United States v. Munroe,* 421 F.2d 644, 645 (5th Cir. 1970); *United States v. Harris,* 542 F.2d 1283, 1293 (4th Cir. 1977); *United States v. Isgro,* 974 F.2d 1091, 1094-1095 (9th Cir. 1993). Moreover, in support of her claim that the government's lawyer agreed that she should not have been convicted of making a false statement, Petitioner cites to the sentencing transcript (Exhibit D attached to Brief in Support) in which her attorney indicates that *he* did not think that the government's lawyer felt his client was guilty of this count. The opinion of Petitioner's counsel has no legal significance in light of the sufficient evidence supporting the jury's verdict on this count.

For all the foregoing reasons, then, the undersigned recommends that the Motion to Vacate, Set Aside, or Correct Sentence be denied. The parties are advised that any objection to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge Gadola's acceptance thereof is waived.

/s/ Thomas A. Carlson

THOMAS A. CARLSON
UNITED STATES
MAGISTRATE JUDGE

DATED: 10/27/98

cc: Honorable Paul V. Gadola
S. Allen Early
Mark C. Jones